UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.539/Add.4
7 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
12 May-18 July 1997

# DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

## CHAPTER II

## NATIONALITY IN RELATION TO SUCCESSION OF STATES

Addendum

CONTENTS

Paragraphs Page

C. Text of the draft articles on Nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading .

1. Text of the draft articles (See A/CN.4/L.539/Add.1) . . . . . .

2. Text of the draft articles with commentaries thereto

PART I. GENERAL PROVISIONS

Article 13. Status of habitual residents . . . . . .

Article 14. Non-discrimination . . . . . .

Article 15. Prohibition of arbitrary decisions concerning nationality issues . . . . . .

Article 16. Procedures relating to nationality issues . .

Article 17. Exchange of information, consultation and negotiation . . . . . .

(For articles 18 to 26, see A/CN.4/L.539/Add.5 and subsequent addenda)

GE.97-62446 (E)

Article 13 69/

Status of habitual residents

1. The status of persons concerned as habitual residents shall not be affected by the succession of States.

2. A State concerned shall take all necessary measures to allow persons concerned who, because of events connected with the succession of States, were forced to leave their habitual residence on its territory to return thereto.

Commentary

(1) Paragraph 1 of article 13 sets out the rule that the status of habitual residents is not affected by a succession of States as such, or in other words, that persons concerned who are habitual residents of a territory on the date of the succession retain such status. Habitual residence is indeed a very important criterion for the determination of nationality in cases of succession of States, as indicated in the commentaries to the draft articles in Part II below.

(2) Paragraph 2 addresses the problem of habitual residents in the specific case where the succession of States is the result of events leading to the displacement of a large part of the population. The purpose of this provision is to ensure the effective restoration of the status of habitual residents as protected under paragraph 1. The Commission felt that, in light of recent experience, it was desirable to address explicitly the problem of this vulnerable group of persons. Certain members expressed reservations with respect to this provision. Some of those holding this view argued that this provision was superfluous in the light of paragraph 1, others that paragraph 2 dealt with the problem of refugees and was therefore outside the scope of the draft articles.

(3) The question of the status of habitual residents addressed in article 13 is different from the question whether such persons may or may not retain the right of habitual residence in a State concerned if they acquire, following the succession of States, the nationality of another State concerned. While there was general agreement in the Commission on the principle that a State concerned has the obligation to preserve the right of

---

69/ Article 13 corresponds to article 10 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, pp. 80-81.

habitual residence of persons concerned who, following a succession of States became ex lege nationals of another State concerned, views differed considerably on the question as to whether the same should apply in respect of habitual residents who became voluntarily nationals of another State concerned. Some members believed that international law, at present, allowed a State to require that the latter category of persons transfer their habitual residence outside of its territory. 70/ They stressed, however, that it was important to ensure that persons concerned be provided with a reasonable time limit for such transfer of residence, as proposed by the Special Rapporteur in his Third report. 71/

(4) Other members, however, felt that the requirement of transfer of residence did not take into consideration the current stage of the development of human rights law. They considered that the draft articles should prohibit the imposition by States of such a requirement, even if this entailed moving into the realm of lex ferenda. 72/

---

70/ It must be noted that, under the treaties concluded with a number of successor States after the First World War, an option for the nationality of a State other than the State of habitual residence carried the obligation to transfer one's residence accordingly. Such provisions were contained in respective article 3 of the Treaty of Versailles with Poland, the Treaty of Saint-Germain-en-Laye with Czechoslovakia, the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State and the Treaty of Paris with Romania (G.F. de Martens, Nouveau recueil général de traités, third series, vol. XIII, pp. 505, 514, 524 and 531 respectively). In the case of the Acquisition of Polish nationality, Arbitrator Kaeckenbeeck held that the successor State normally had the right "established in international practice, and expressly recognized by the best authors" to require the emigration of such persons as had opted against the nationality of the successor State; accordingly Poland was entitled to order those inhabitants of Upper Silesia who had opted for German nationality to leave at the end of a specific period. (United Nations, Reports of International Arbitral Awards, vol. I, p. 427.) Similarly, it has been stated more recently that, "failing a stipulation expressly forbidding it, the acquiring State may expel those inhabitants who have made use of the option and retained their old citizenship, since otherwise the whole population of the ceded territory might actually consist of aliens". (Oppenheim's International Law, op. cit., p. 685.)

71/ See Draft article 10, paragraph 3, document A/CN.4/480.

72/ In this connection, it must be observed that, in recent cases of succession of States in Eastern and Central Europe, although the legislations of some successor States provided that their nationals who voluntarily acquired the nationality of another successor State would automatically lose their nationality, such legislations did not require persons concerned to transfer their residence. The European Convention on Nationality stipulates in this respect that "nationals of a predecessor State habitually resident in the territory over which sovereignty is transferred to a successor State and who have not acquired its nationality shall have the right to remain in that State" (Article 20, para. 1 (a), Council of Europe document DIR/JUR (97) 6).

(5) The Commission, without taking a position on the above discussion, concluded that this was an issue relating to the treatment of aliens and it consequently saw no particular need to address the matter in the present draft articles.

Article 14 73/

Non-discrimination

States concerned shall not deny persons concerned the right to retain or acquire a nationality or the right of option upon the succession of States by discriminating on any ground.

Commentary

(1) The interest in avoiding discriminatory treatment as regards matters of nationality in relation to a succession of States led to the inclusion of certain relevant provisions in several treaties adopted following the First World War, as attested by the advisory opinion of the Permanent Court of International Justice on the question of Acquisition of Polish Nationality, in which the Court stated that "[o]ne of the first problems which presented itself in connection with the protection of minorities was that of preventing [... new States, ... which, as a result of the war, have had their territory considerably enlarged, and whose population was not therefore clearly defined from the standpoint of political allegiance] from refusing their nationality, on racial, religious or linguistic grounds, to certain categories of persons, in spite of the link which effectively attached them to the territory allocated to one or other of these States". 74/

(2) The problem of discrimination in matters of nationality was also addressed in article 9 of the 1961 Convention on Reduction of Statelessness, which prohibits the deprivation of nationality on racial, ethnic, religious or political grounds, albeit in a more general context. The European Convention on Nationality also contains a general prohibition of discrimination in

---

Similarly, article 16 of the Venice Declaration provides that "[t]he exercise of the right to choose the nationality of the predecessor State, or of one of the successor States, shall have no prejudicial consequences for those making that choice, in particular with regard to their right to residence in the successor State and their movable or immovable property located therein". (Council of Europe document CDL-NAT (96) 7 rev.)

73/ Article 14 corresponds to ariticle 12 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 88.

74/ P.C.I.J. 1923, Series B, No. 7, p. 15.

matters of nationality: article 5, paragraph 1, provides that "[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin". 75/

(3) While discrimination has been mostly based on the above-mentioned criteria, there may still be other grounds for discrimination in nationality matters in relation to a succession of States. 76/ The Commission therefore decided not to include in article 14 an illustrative list of such criteria and opted for a general formula prohibiting discrimination on "any ground", avoiding, at the same time, the risk of any a contrario interpretation.

(4) Article 14 prohibits discrimination resulting in the denial of the right of a person concerned to a particular nationality or, as the case may be, to an option. It does not address the question whether a State concerned may use any of the above or similar criteria for enlarging the circle of individuals entitled to acquire its nationality. Reference may be made in this connection to the jurisprudence of the Inter-American Court of Human Rights which, in the case concerning Amendments to the naturalization provisions of the Constitution of Costa Rica, 77/ concluded that it was basically within the sovereignty of a State to give preferential treatment to aliens who, viewed objectively, would more easily and more rapidly assimilate within the national community and identify more readily with the traditional beliefs, values and institutions of that country, and accordingly held that

---

75/ Article 18 of the Convention explicitly states that this provision is applicable also in situations of State succession. Council of Europe document DIR/JUR (97) 6.

76/ See, e.g., recent discussions concerning the application of the requirement of a clean criminal record for attributing nationality upon option. Experts of the Council of Europe stated in this connection that, "[while a] clean criminal record requirement in the context of naturalization is a usual and normal condition and compatible with European standards in this area, ... the problem is different in the context of State succession [where] it is doubtful whether ... under international law citizens that have lived for decades on the territory, perhaps [were] even born there, can be excluded from citizenship just because they have a criminal record ..." (Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., paras. 73 and 76). A similar view has been expressed by UNHCR experts, according to whom "[t]he placement of this condition upon granting of citizenship in the context of State succession is not justified [and] would appear discriminatory vis-à-vis a sector of the population which has a genuine and effective link with the [successor State]". (The Czech and Slovak Citizenship Laws and the Problem of Statelessness, op. cit., para. 76.)

77/ Advisory opinion of 19 January 1984, ILR, vol. 79, p. 283.

preferential treatment in the acquisition of Costa Rican nationality through naturalization, which favoured Central Americans, Ibero-Americans and Spaniards over other aliens, did not constitute discrimination contrary to the Inter-American Convention on Human Rights. 78/ The principle applied by the Court appears to be also valid in the more specific context of a succession of States.

(5) Some members regretted the fact that article 14 did not address the question of the discriminatory treatment by a successor State of its nationals depending on whether they had its nationality prior to the succession of States or they acquired it as a result of such succession. Others believed that this was a human rights issue of a more general character and therefore outside the scope of the present draft articles.

## Article 15 79/

### Prohibition of arbitrary decisions concerning nationality issues

In the application of the provisions of any law or treaty, persons concerned shall not be arbitrarily deprived of the nationality of the predecessor State, or arbitrarily denied the right to acquire the nationality of the successor State or any right of option, to which they are entitled in relation to the succession of States.

### Commentary

(1) Article 15 applies to the specific situation of a succession of States the principle embodied in article 15, paragraph 2, of the Universal Declaration of Human Rights, which provides that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." The prohibition of arbitrary deprivation of nationality has been reaffirmed in a number of other instruments, such as the 1961 Convention on the Reduction of Statelessness, 80/ the 1989 Convention on the Rights of the Child, 81/ and the 1997 European Convention on Nationality. 82/

---

78/ See also Chan, op. cit., p. 6.

79/ Article 15 corresponds to article 13 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 92.

80/ Article 8, paragraph 4.

81/ Article 8.

82/ Articles 4, paragraph (c) and 18.

(2) Article 15 contains two elements. The first is the prohibition of the arbitrary withdrawal by the predecessor State of its nationality from persons concerned who were entitled to retain such nationality following the succession of States and of the arbitrary refusal by the successor State to attribute its nationality to persons concerned who were entitled to acquire such nationality either ex lege or upon option. The second element is the prohibition of the arbitrary denial of a person's right of option that is an expression of the right of a person to change his or her nationality in the context of a succession of States.

(3) The opening phrase "In the application of the provisions of any law or treaty" indicates that the purpose of the article is to prevent abuses which may occur in the process of the application of legal instruments which, in themselves, are consistent with the present draft articles. The expression "the provisions of any law or treaty" has to be interpreted as referring to legislative provisions in the broad sense of the term or treaty provisions which are relevant to the attribution or withdrawal of nationality or to the recognition of the right of option to a particular person concerned. The phrase "to which they are entitled" refers to the subjective right of any such person based on above-described provisions.

### Article 16 83/

### Procedures relating to nationality issues

> Applications relating to the acquisition, retention or renunciation of nationality or to the exercise of the right of option in relation to the succession of States shall be processed without undue delay and relevant decisions shall be issued in writing and shall be open to effective administrative or judicial review.

### Commentary

(1) Article 16 is intended to ensure that the procedure followed with regard to nationality matters in cases of succession of States is orderly,

---

83/ Article 16 corresponds to article 14 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 94.

given its possible large-scale impact. 84/ The elements spelled out in this provision represent minimum requirements in this respect.

(2) The review process regarding decisions concerning nationality in relation to the succession of States has been based in practice on the provisions of municipal law governing review of administrative decisions in general. In some cases this encompassed judicial review; in others it did not. 85/ The existence of a judicial review process did not exclude prior recourse to an administrative review process. The phrase "administrative or judicial review" used in this article is not intended to suggest two mutually exclusive processes. 86/

## Article 17 87/

### Exchange of information, consultation and negotiation

1. States concerned shall exchange information and consult in order to identify any detrimental effects on persons concerned with respect to their nationality and other connected issues regarding their status as a result of the succession of States.

---

84/ It is interesting to note that, in relation to recent cases of succession of States, the UNHCR Executive Committee stressed the importance of fair and swift procedures relating to nationality issues when emphasizing that "the inability to establish one's nationality ... may result in displacement". (Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1), para. 20.)

85/ See "Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", CEDIN, Paris X-Nanterre, Table ronde, décembre 1993, responses to the Questionnaire.

86/ In the same vein, article 12 of the European Convention on Nationality sets out the requirement that decisions concerning nationality "be open to an administrative or judicial review." The Convention further contains the following requirements regarding procedures relating to nationality: a reasonable time limit for processing applications relating to nationality issues; the provision of reasons for decisions on these matters in writing; and reasonable fees (articles 10, 11 and 13 respectively). Council of Europe document DIR/JUR 97 (6).

87/ Article 17 corresponds to article 15 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 95.

2. States concerned shall, when necessary, seek a solution to eliminate or mitigate such detrimental effects by negotiation and, as appropriate, through agreement.

Commentary

(1) The Commission considered that exchange of information and consultations between States concerned are essential components of any meaningful examination of the effects of a succession of States on persons concerned. The purpose of such endeavours is to identify the negative repercussions a particular succession of States may have both on the nationality of the persons concerned and on other issues intrinsically linked to nationality.

(2) Paragraph 1 sets out the obligations of States concerned in this respect in the most general terms, without indicating the precise scope of the questions which are to be the subject of consultations between them. One of the most important questions is the prevention of statelessness. States concerned, shall, however, also address questions such as dual nationality, the separation of families, military obligations, pensions and other social security benefits, the right of residence, etc.

(3) Concerning paragraph 2, there are two points worth noting. First, the obligation to negotiate to seek a solution does not exist in the abstract; States do not have to negotiate if they have not identified any adverse effects on persons concerned as regards the above questions. Second, it is not presumed that every negotiation must inevitably lead to the conclusion of an agreement. The purpose, for example, could simply be achieved through the harmonization of national legislations or administrative decisions. States

concerned may, however, prefer to conclude an agreement to resolve the problems they have identified. 88/ The obligation in paragraph 2 must be understood in the light of these two caveats.

(4) In the view of the Commission, there is a close link between the obligations in article 17 and the right to a nationality in the context of a succession of States embodied in article 1, as the purpose of the former is to ensure that the right to a nationality is an effective right. Article 17 is also based on the general principle of the law of State succession providing for the settlement of certain questions relating to succession by agreement between States concerned, embodied in the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

(5) Article 17 does not address the problem which arises when one of the States concerned does not act in conformity with its provisions or when negotiations between States concerned are abortive. Even in such situations, however, there are certain obligations incumbent upon States concerned and the refusal of one party to consult and negotiate does not entail complete freedom of action for the other party. These obligations are included in Part I of the present draft articles.

---

88/ The Czech Republic and Slovakia, for example, concluded several agreements of this nature, such as the Treaty on interim entitlement of natural and legal persons to profit-related activities on the territory of the other Republic, the Treaty on mutual employment of nationals, the Treaty on the transfer of rights and obligations from labour contracts of persons employed in organs and institutions of the Czech and Slovak Federal Republic, the Treaty on the transfer of rights and obligations of policemen serving in the Federal Police and members of armed forces of the Ministry of the Interior, the Treaty on social security and the administrative arrangement to that Treaty, the Treaty on public health services, the Treaty on personal documents, travel documents, drivers' licences and car registrations, the Treaty on the recognition of documents attesting education and academic titles, the Agreement on the protection of investment and a number of other agreements concerning financial issues, questions of taxation, mutual legal assistance, cooperation in administrative matters, etc.

---

UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.539/Add.5
9 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
12 May-18 July 1997

# DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

## CHAPTER II

## NATIONALITY IN RELATION TO SUCCESSION OF STATES

Addendum

CONTENTS

| | | Paragraphs | Page |
|---|---|---|---|
| C. | Text of the draft articles on Nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading . . . . . | | |
| | 1. Text of the draft articles (See A/CN.4/L.539/Add.1) . . . . . | | |
| | 2. Text of the draft articles with commentaries thereto . . . . . | | |
| PART I. | GENERAL PROVISIONS . . . . . | | |
| | Article 18. Other States . . . . . | | |

CONTENTS (continued)


| | | Paragraphs | Page |
|---|---|---|---|
| PART II. | PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES . . . . . | | |
| | Article 19. Application of Part II . . . . . | | |
| | SECTION 1 TRANSFER OF PART OF THE TERRITORY . . . . . | | |
| | Article 20. Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State . . . . . | | |
| | SECTION 2 UNIFICATION OF STATES . . . . . | | |
| | Article 21. Attribution of the nationality of the successor State . . . . . | | |

(For articles 22 to 26, see A/CN.4/L.539/Add.6 and subsequent addenda)

Article 18 89/

Other States

1. Nothing in the present draft articles requires States to treat persons concerned having no effective link with a State concerned as nationals of that State, unless this would result in treating those persons as if they were stateless.

2. Nothing in the present draft articles precludes States from treating persons concerned, who have become stateless as a result of the succession of States, as nationals of the State concerned whose nationality they would be entitled to acquire or retain, if such treatment is beneficial to those persons.

Commentary

(1) Paragraph 1 safeguards the right of other States not to give effect to a nationality attributed by a State concerned in disregard of the requirement of an effective link. International law cannot, on its own, invalidate or correct the effects of national legislation on the nationality of individuals, but it allows "some control of exorbitant attributions by States of their nationality, by depriving them of much of their international effect", because "the determination by each State of the grant of its own nationality is not necessarily to be accepted internationally without question". 90/ In the final analysis, the role of international law concerning nationality in general - at least from the standpoint of general principles and custom - is in a certain sense a negative one. 91/

(2) The need to "draw a distinction between a nationality link that is opposable to other sovereign States and one that is not, notwithstanding its validity within the sphere of jurisdiction of the State [in question]" 92/ has

---

89/ Article 18 corresponds to article 16 proposed by the Special Rapporteur in his Third report, document A/CN.4/480, p. 98.

90/ Oppenheim's International Law, op. cit., p. 853.

91/ See Rezek, op. cit., p. 371; Paul Lagarde, La nationalité française, Paris, Dalloz, 1975, p. 11; Jacques de Burlet, "De l'importance d'un 'droit international coutumier de la nationalité'", Revue critique de droit international privé, 1978, vol. 67, p. 307 et seq. See also paragraph (4) of the commentary to the preamble.

92/ Rezek, op. cit., p. 357.

led to the development of the theory of effective nationality. 93/ As regards the specific situation of a succession of States, it is also widely accepted that "[t]here must be a sufficient link between the successor State and the persons it claims as its nationals in virtue of the succession, and the sufficiency of the link might be tested if the successor State attempted to exercise a jurisdiction over those persons in circumstances disapproved of by international law, or attempted to represent them diplomatically; provided, that is, there is some State competent to protest on behalf of the persons concerned". 94/

(3) A number of writers on the topic of the succession of States who hold the above view that the successor State may be limited in its discretion to extend its nationality to persons who lack an effective link with the territory concerned base their argument on the decision of the International Court of Justice in the Nottebohm case. 95/ In its judgment, the Court indicated some elements on which an effective nationality can be based. As the Court said, "[d]ifferent factors are [to be] taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country

---

93/ See Brownlie (1990), op. cit., p. 397 et seq.; H.F. van Panhuys, The Role of Nationality in International Law, Leyden, Sijthoff, 1959, p. 73 et seq.; Paul Weis, Nationality and Statelessness in International Law, second edition, Germantown, Maryland, Sijthoff-Noordhoff, 1979, p. 197 et seq.; de Burlet (1978), op. cit., p. 323 et seq. For Charles Rousseau, the theory of effective nationality is "a specific aspect of the more general theory of effective legal status in international law". (Rousseau, op. cit., p. 112).

94/ O'Connell (1967), op. cit., p. 499.

95/ According to the Court, "a State cannot claim that the rules [pertaining to the acquisition of its nationality that it has laid down] are entitled to recognition by another State unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States". I.C.J. Reports, 1955, p. 23.

and inculcated in his children, etc". 96/ It is to be noted, however, that the Italian-United States Conciliation Commission, in the Flegenheimer case (1958), concluded that it was not in its power to deny the effects at the international level of a nationality conferred by a State, even without the support of effectivity, except in cases of fraud, negligence or serious error. 97/

(4) In practice, different tests for determining the competence of the successor State to attribute its nationality on certain persons have been considered or applied, such as habitual residence or birth. Thus, e.g., the Peace Treaties after the First World War as well as other instruments used as a basic criterion that of habitual residence. 98/ But, as has been pointed out, "[a]lthough habitual residence is the most satisfactory test for determining the competence of the successor State to impress its nationality on specified persons, it cannot be stated with assurance to be the only test admitted in international law". 99/ Some authors have favoured the test of birth in the territory affected by the succession as proof of an effective link with the successor State. 100/ In recent dissolutions of States in

---

96/ Ibid., p. 22. The Court's judgment admittedly elicited some criticism. It has been argued, in particular, that the Court had transferred the requirement of an effective connection from the context of dual nationality to a situation involving only one nationality and that a person who had only one nationality should not be regarded as disentitled to rely on it against another State because he or she had no effective link with the State of nationality but only with a third State.

97/ See United Nations, Reports of International Arbitral Awards, vol. XIV, p. 327.

98/ The Treaties of Peace of Saint-Germain-en-Laye and of Trianon, however, adopted the criterion of pertinenza (indigénat), which did not necessarily coincide with habitual residence.

99/ O'Connell (1967), op. cit., p. 518.

100/ In the case of Romana v. Comma, in 1925, the Egyptian Mixed Court of Appeal relied on this doctrine when it held that a person born in Rome and resident in Egypt became, as a result of the annexation of Rome in 1870, an Italian national. Annual Digest and Reports of Public International Law Cases, vol. 3, No. 195.

Eastern Europe, the main accent was often put on the "citizenship" of the component units of the federal State that disintegrated, which existed in parallel to federal nationality. 101/

(5) The term "link" in paragraph 1 of article 18 is qualified by the adjective "effective". The intention was to use the terminology of the International Court of Justice in the Nottebohm case. 102/ Although the question of non-opposability of nationality not based on an effective link is a more general one, the scope of application of paragraph 1 is limited to the non-opposability of a nationality acquired or retained following a succession of States.

(6) Paragraph 2 deals with the problem that arises when a State concerned denies a person concerned the right to retain or acquire its nationality by means of discriminatory legislation or an arbitrary decision and, as a consequence, such person becomes stateless. As already stated, international law cannot correct the deficiencies of internal acts of a State concerned, even if they result in statelessness. This, however, does not mean that other States are simply condemned to a passive role. There have indeed been instances where States did not recognize any effect to the legislation of another State aimed at denying its nationality to certain categories of persons, albeit in a context other than a succession of States: such was the position of the Allies with respect to the Nazi Citizenship Law denationalizing German Jews or of the international community vis-à-vis the establishment of "bantustans" by South Africa. 103/

---

101/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) to (10) of the commentary to draft article 20 proposed by the Special Rapporteur.

102/ It must be noted that, in the English version of the Judgment, the Court also uses the expression "genuine connection", the equivalent of which is "rattachement effectif" in the French version. I.C.J. Reports, 1955, p. 23.

103/ See Lauterpacht, op. cit. For the condemnation by the United Nations of the establishment of "bantustans", see General Assembly resolution 31/6 of 26 October 1976.

(7) The provision of paragraph 2 is, however, not limited to the case where statelessness results from an act of a State concerned. It also applies where a person concerned has, by his or her negligence, contributed to such situation.

(8) The purpose of paragraph 2 is to alleviate, not to further complicate, the situation of stateless persons. Accordingly, this provision is subject to the requirement that the treatment of such persons as nationals of a particular State concerned be for their benefit, and not to their detriment. In practical terms, this means that other States may extend to these persons a favourable treatment granted to nationals of the State in question. However, they may not, for example, deport such persons to that State as they could do with its actual nationals (provided that there would be legitimate reasons for such action).

(9) Some members expressed reservations with regard to article 18 as a whole, or with either of its two paragraphs. As regards paragraph 1, it was argued that it dealt with a problem of a more general character which need not be addressed in the specific context of the succession of States. Concerning paragraph 2, certain members were opposed to its inclusion as they considered that it gave too much prominence to the competence of other States. Some stated, however, that they could accept the paragraph if it were explicitly provided that other States could treat a stateless person as a national of a particular State concerned only "for the purposes of their domestic law".

## PART II. PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES

### Article 19

### Application of Part II

States shall take into account the provisions of Part II in giving effect to the provisions of Part I in specific situations.

### Commentary

(1) While the provisions of Part I are general, in the sense that they apply to all categories of succession of States, the provisions of Part II indicate how these general provisions may be applied in specific categories of succession. Articles 20 to 26 are mainly intended to provide guidance to States concerned, both in their negotiations, as well as in the elaboration of

national legislation in the absence of any relevant treaty. Thus, States concerned may agree among themselves to apply the provisions of Part I by departing from those in Part II if this would be more appropriate given the characteristics of the particular succession of States.

(2) The identification of the rules governing the distribution of individuals among the States involved in a succession derives in large part from the application of the principle of effective nationality to a specific case of succession of States. As regards the criteria used for establishing the rules concerning the attribution of the nationality of the successor State, the withdrawal of the nationality of the predecessor State and the recognition of a right of option in Part II, the Commission, on the basis of State practice, has given particular importance to habitual residence. 104/ Other criteria such as the place of birth or the legal bond with a constituent unit of the predecessor State, however, become significant for the determination of the nationality of persons concerned who have their habitual residence outside the territory of a successor State, in particular when they lose the nationality of the predecessor State as a consequence of the latter's disappearance. To refrain from the use of these criteria in such a situation would not be justified, as it could lead to statelessness.

(3) The provisions in Part II are grouped into four sections, each dealing with a specific type of succession of States. This typology follows, in principle, that of the 1983 Vienna Convention on the Succession of States in respect of State Property, Archives and Debts. Notwithstanding the fact that the Commission has duly taken into account the practice of States during the process of decolonization for the purpose of the elaboration of the provisions in Part I, it decided to limit the specific categories of succession dealt with in Part II to the following: transfer of part of the

---

104/ See Second report on State succession and its impact on the nationality of natural and legal persons, document A/CN.4/474, paras. 50-81. See also paragraph (4) of the commentary to article 4. As regards the nationality laws of newly independent States, it must be observed that, while some countries applied residence as a basic criterion, others employed criteria such as ius soli, ius sanguinis and race. See Yasuaki Onuma, "Nationality and Territorial Change: In Search of the State of the Law", The Yale Journal of World Public Order, vol. 8 (1981), pp. 15-16; and Jacques de Burlet, Nationalité des personnes physiques et décolonisation (Brussels, Bruylant, 1975), pp. 144-180.

territory, unification of States, dissolution of a State and separation of part of the territory. It did not include in this Part a separate section on "Newly independent States", as it believed that one of the above four sections would be applicable, mutatis mutandis, in any remaining case of decolonization in the future. Some members, however, would have preferred the inclusion of such additional section.

## SECTION 1

## TRANSFER OF PART OF THE TERRITORY

### Article 20 105/

### Attribution of the nationality of the successor State and withdrawal of the nationality of the predecessor State

When part of the territory of a State is transferred by that State to another State, the successor State shall attribute its nationality to the persons concerned who have their habitual residence in the transferred territory and the predecessor State shall withdraw its nationality from such persons, unless otherwise indicated by the exercise of the right of option which such persons shall be granted.

### Commentary

(1) Section 1 consists of a single article, namely article 20. As indicated by the opening phrase "When part of the territory of a State is transferred by that State to another State", article 20 applies in the case of cessions of territory between two States on a consensual basis. While this phrase refers to standard modes of transfer of territory, the substantive rule embodied in article 20 also applies mutatis mutandis to the situation where a dependent territory becomes part of the territory of a State other than the State which was responsible for its international relations, that is, the case of a non-self-governing territory which achieves its decolonization by integration with a State other than the colonial State.

(2) The rule in article 20 is based on the prevailing State practice: 106/ persons concerned who have their habitual residence in

---

105/ Article 20 corresponds to article 17 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 8.

106/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (27) of the commentary to draft article 17 proposed by the Special Rapporteur.

the transferred territory acquire the nationality of the successor State and consequently lose the nationality of the predecessor State, unless they opt for the retention of the latter's nationality. 107/

(3) As to the effective date on which persons concerned who have not exercised the right of option become nationals of the successor State, the Commission believed that it depended on the specific character of the transfer: thus, when a transfer of territory involves a large population, such change of nationality should take effect on the date of the succession; on the contrary, in cases of transfers involving a relatively small population, it may be more practical that the change in nationality take place on the expiration of the period for the exercise of the option. The latter scenario is not inconsistent with the presumption in article 4 of automatic change of nationality on the date of the succession, since the said presumption is rebuttable as explained in the commentary to that article.

(4) Whatever the date of the acquisition of the nationality of the successor State, the predecessor State must comply with its obligation to prevent statelessness under article 3, and shall therefore not withdraw its nationality before such date. 108/

---

107/ See also article 18, paragraph (b) of the 1929 Harvard Draft Convention on Nationality which provided that "[w]hen a part of the territory of a State is acquired by another State [...], the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof." (American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 15).

108/ In the same spirit, article 12 of the Venice Declaration provides that "[t]he predecessor State shall not withdraw its nationality from its own nationals who have been unable to acquire the nationality of a successor State" (Council of Europe document CDL-NAT (96) 7 rev.)

The 1961 Convention on the Reduction of Statelessness addresses the problem of statelessness in case of a transfer of territory from a different perspective: article 10, paragraph 2, provides that, should a person concerned become stateless as a result of the transfer, and in the absence of relevant treaty provisions, the successor State shall attribute its nationality to such person.

(5) Although there have been instances where the right to opt for the retention of the nationality of the predecessor State was granted only to some categories of persons residing in the transferred territory, the Commission considered that all such persons should be granted this right, even if this clearly entailed a progressive development of international law. Some members, however, considered that this approach was too great a departure from existing practice and that the right of option should be granted only to those persons concerned who had certain specific links with the predecessor State. On the other hand, the Commission did not believe that it was necessary to address in article 20 the question whether there are any categories of nationals of the predecessor State having their habitual residence outside the transferred territory who should be granted a right to opt for the acquisition of the nationality of the successor State. Naturally, the successor State remains free, subject to the provisions of Part I, to offer its nationality to such persons when they have an appropriate connection with the transferred territory.

(6) In the Commission's view, persons concerned who have opted for the nationality of the predecessor State under the terms of article 20 should be deemed to have retained such nationality from the date of the succession. Thus, there would be no break in the continuity of the possession of the nationality of the predecessor State.

## SECTION 2

## UNIFICATION OF STATES

### Article 21 109/

### Attribution of the nationality of the successor State

Without prejudice to the provisions of article 7, when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united, the successor State shall attribute its nationality to all persons who, on the date of the succession of States, had the nationality of a predecessor State.

---

109/ Article 21 corresponds to article 19 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 22.

Commentary

(1) Section 2 also consists of one article, namely article 21. As indicated by the phrase "when two or more States unite and so form one successor State, irrespective of whether the successor State is a new State or whether its personality is identical to that of one of the States which have united", article 21 covers the same situations as those described in the commentaries to the draft articles on succession of States in respect of treaties and in respect of matters other than treaties concerning the case of unification of States. 110/ The Commission found it preferable to spell out the two possible scenarios in the text of the article itself.

(2) The unification of States envisaged in article 21 may lead to a unitary State, to a federation or to any other form of constitutional arrangement. It must be emphasized, however, that the degree of separate identity retained by the original States after unification in accordance with the constitution of the successor State is irrelevant for the operation of the provision set forth in this article. 111/ It must also be stressed that article 21 does not apply to the establishment of an association of States which does not have the attributes of a successor State. 112/

(3) As the loss of the nationality of the predecessor State or States is an obvious consequence of territorial changes resulting in the disappearance of the international legal personality of such State or States, the main problem addressed in this article is that of the attribution of the nationality of the successor State to persons concerned. In this case, the

---

110/ Yearbook ... 1974, vol. II (Part One), p. 253 et seq., document A/9610/Rev.1, commentary to draft articles 30 to 32; Yearbook ... 1981, vol. II (Part Two), p. 43, document A/36/10, commentary to draft article 15.

111/ This was also the view expressed by the Commission in relation to draft articles 30 to 32 on the succession of States in respect of treaties, Yearbook ... 1974, vol. II (Part One), p. 253, document A/9610/Rev.1, para. (2) of the commentary to those articles.

112/ This is for instance the case of the European Union, despite the fact that the Maastricht Treaty on European Union established a "citizenship of the Union". Under the terms of article 8, "[e]very person holding the nationality of a member State shall be a citizen of the Union". The question whether an individual possesses the nationality of a member State is to be settled solely by reference to the national law of that State. International Legal Materials, vol. XXXI (1992), pp. 259 and 365.

term "persons concerned" refers to the entire body of nationals of the predecessor State or States, irrespective of the place of their habitual residence.

(4) Accordingly, article 21 provides that, in principle, the successor State has the obligation to attribute its nationality to all persons concerned. As regards, however, a person concerned who has his or her habitual residence outside the territory of the successor State and also has another nationality, whether that of the State of residence or that of any other third State, the successor State may not attribute its nationality to such person against his or her will. This exception is taken into account by the inclusion of the phrase "Without prejudice to the provisions of article 7".

(5) The provision in article 21 reflects State practice. Where unification has involved the creation of a new State, such State attributed its nationality to the former nationals of all States that merged, as did, for instance, the United Arab Republic in 1958. 113/ Where unification has occurred by incorporation of one State into another State which has maintained its international personality, the latter extended its nationality to all nationals of the former. 114/ This was the case, for example, when Singapore

---

113/ Article 2 of the Provisional Constitution of the United Arab Republic of 5 March 1958 provided that "[n]ationality of the United Arab Republic is enjoyed by all bearers of the Syrian or Egyptian nationalities; or who are entitled to it by laws or statutes in force in Syria or Egypt at the time this Constitution takes effect." (Text reproduced in Eugène Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", The International and Comparative Law Quarterly, vol. 8 (1959), p. 374.) This provision was re-enacted in article 1 of the Nationality Law of the United Arab Republic.

114/ The 1929 Harvard Draft Convention on Nationality only dealt with the case of unification by incorporation. Paragraph (a) of article 18 provided that, "[w]hen the entire territory of a State is acquired by another State, those persons who were nationals of the first State become nationals of the successor State, unless in accordance with the provisions of its law they decline the nationality of the successor State." (American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 15). The comment to this provision stressed that this rule "is applicable to naturalized persons as well as to those who acquired nationality at birth". (Ibid., p.61.)

joined the Federation of Malaya in 1963. 115/ The Commission believed that the rule set forth in article 21 is sufficiently broad as to cover the obligations of a successor State under both scenarios.

(6) The Commission was of the view that article 21 embodies a rule of customary international law. In any event, the successor State, which after the date of the succession, is the only remaining State concerned cannot conclude an agreement with another State concerned which would depart from the above provision. It would be, moreover, difficult to imagine how the successor State could "give effect to the provisions of Part I" in a different manner.

---

115/ Upon unification, persons who had been citizens of Singapore acquired the citizenship of the Federation, but also maintained the status of citizens of Singapore as one of the units constituting the Federation (Goh Phai Cheng, Citizenship Laws of Singapore (Singapore, Educational Publications), pp. 7-9. See the materials submitted by Singapore.) For other cases of unification by incorporation, namely the incorporation of Hawaii into the United States and the reunification of Germany, see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paragraphs (2), and (5) to (6), respectively, of the commentary to draft article 18 proposed by the Special Rapporteur.

UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.539/Add.6
11 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
12 May - 18 July 1997

# DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

## CHAPTER II

## NATIONALITY IN RELATION TO SUCCESSION OF STATES

Addendum

CONTENTS

Paragraphs Page

C. Text of the draft articles on Nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading . . . . . .

1. Text of the draft articles (See A/CN.4/L.539/Add.1) . . . . . .

2. Text of the draft articles with commentaries thereto . . . . . .

GE.97-62783 (E)

CONTENTS (continued)


| | | Paragraphs | Page |
|---|---|---|---|
| PART II. | PROVISIONS RELATING TO SPECIFIC CATEGORIES OF SUCCESSION OF STATES . . . . . | | |
| | SECTION 3 . . . . . | | |
| | DISSOLUTION OF A STATE . . . . . | | |
| | Article 22: Attribution of the nationality of the successor States . . . . . | | |
| | Article 23: Granting of the right of option by the successor States . . . . . | | |
| | SECTION 4 . . . . . | | |
| | SEPARATION OF PART OR PARTS OF THE TERRITORY . . . | | |
| | Article 24: Attribution of the nationality of the successor State . . . . . | | |
| | Article 25: Withdrawal of the nationality of the predecessor State . . . . . | | |
| | Article 26: Granting of the right of option by the predecessor and the successor States . . . . . | | |
| | Article 27: Cases of succession of States covered by the present draft articles . . . . | | |

## SECTION 3

## DISSOLUTION OF A STATE

### Article 22 1/

### Attribution of the nationality of the successor States

When a State dissolves and ceases to exist and the various parts of the territory of the predecessor State form two or more successor States, each successor State shall, subject to the provisions of article 23, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 7:

(i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

(ii) persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

### Article 23 2/

### Granting of the right of option by the successor States

1. Successor States shall grant a right of option to persons concerned covered by the provisions of article 22 who are qualified to acquire the nationality of two or more successor States.

2. Each successor State shall grant a right to opt for its nationality to persons concerned who are not covered by the provisions of article 22.

---

1/ Article 22 corresponds to articles 19 and 20 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 27.

2/ Article 23 corresponds to article 21 proposed by the Special Rapporteur in his Third report, ibid., p. 32.

Commentary

(1) Section 3 consists of two articles, article 22 and article 23, and applies to the case of a dissolution of States, as distinguished from the case of separation of part or parts of the territory, the latter being the object of section 4. Although it may not always be easy in practice to clearly differentiate between those two situations, such distinction is necessary. When a State disappears by dissolution, its nationality also disappears, while in the case of separation of part of the territory, the predecessor State continues to exist and so does its nationality. 3/

(2) The substantive rules embodied in articles 22 and 23 apply mutatis mutandis when the various parts of the predecessor State's territory do not become independent States following the dissolution, but are incorporated into other, pre-existing, States. In such case, the obligations spelled out in articles 22 and 23 would become incumbent upon those States.

(3) As the loss of the nationality of the predecessor State is an automatic consequence of dissolution, the issues to be addressed in section 3 are the attribution of the nationality of the successor States to persons concerned and the granting of the right of option to certain categories of persons concerned.

(4) The core body of nationals of each successor State is defined in paragraph (a) by reference to the criterion of habitual residence, which is consistent with the presumption in article 4. This criterion, widely accepted by publicists, 4/ was used on a large scale, in particular, to resolve the issue of attribution of nationality after the dissolution of the Austro-Hungarian Monarchy. 5/

---

3/ For comparable reasons, the Commission also distinguished between "dissolution" and "separation" when it dealt with the question of succession of States in respect of matters other than treaties. See Yearbook ... 1981, vol. II (Part Two), p. 45, document A/36/10, para. (3) of the commentary to draft articles 16 and 17.

4/ See Onuma, op. cit., note 5 referring to various commentators.

5/ The effects on nationality of the dismemberment of the Austro-Hungarian Monarchy, involving also the dissolution of the core of the dualist Monarchy, were regulated in a relatively uniform manner. Article 64 of the Peace Treaty of Saint-Germain-en-Laye provided that "Austria admits and declares to be Austrian nationals ipso facto and without the requirement of any formality all persons possessing at the date of the coming into force of the present Treaty rights of citizenship (pertinenza) within Austrian territory who are not nationals of any other State." (Laws concerning

(5) In the recent cases of the dissolutions of Yugoslavia and Czechoslovakia, some successor States used the criterion of the "citizenship" of the republics constituting the federation 6/ as the main criterion for determining their nationals, irrespective of their place of habitual residence. 7/ Consequently, some nationals of the predecessor State habitually resident in the territory of a particular successor State were not attributed the latter's nationality. The legislation of the successor States contained separate provisions on the acquisition of their nationality by such persons. 8/ In those instances where they were offered the possibility to

---

nationality, op. cit., p. 586). Similar provisions are contained in article 56 of the Peace Treaty of Trianon concerning the acquisition of Hungarian nationality. (Ibid., p. 587.) Concerning the ambiguities of the concept of "pertinenza", see footnote 98 above.

6/ As pointed out by Rezek, "[i]l y a des federations où la nationalité fédérale coexiste avec une allégeance provinciale et l'Etat [fédéré] est parfois autorisé à légiférer sur cette matière. ... [L]a nationalité fédérale n'appara[it] que comme une conséquence de la nationalité de l'Etat [fédéré], établie suivant les règles dictées par les différentes législatures provinciales." (op. cit., pp. 342-343).

7/ See article 39 of the Citizenship Act of Slovenia of 5 June 1991 ("Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", documents 1, CEDIN, Paris X-Nanterre, Table ronde, décembre 1993); articles 35 and 37 of the Law on Croat Nationality of 26 June 1991 (ibid.); article 46 of the Yugoslav Citizenship Law (No. 33/96, see the materials submitted by Yugoslavia); article 1 of the Czech Law on Acquisition and Loss of Citizenship of 29 December 1992 (No. 40/1993, Col. of Laws, see the materials submitted by the Czech Republic); article 2 of the Law on Citizenship of the Slovak Republic of 19 January 1993 (No. 40/1993, see the materials submitted by Slovakia); article 26, paragraph 1, of the Citizenship Act of the Former Yugoslav Republic of Macedonia of 12 November 1992 (see Carol Batchelor, Philippe Leclerc, Bo Schack, Citizenship and Prevention of Statelessness Linked to the Disintegration of the Socialist Federal Republic of Yugoslavia (UNHCR, 3 April 1997), p. 21); and article 27 of the Citizenship Act of Bosnia and Herzegovina of 6 October 1992 (ibid., p. 27).

8/ Thus, article 40 of the Citizenship Act of Slovenia of 5 June 1991 provided that "[a] citizen of another republic [of the Yugoslav Federation] that had permanent residence in the Republic of Slovenia on the day of the Plebiscite on the independence and autonomy of the Republic of Slovenia on 23 December 1990 and is actually living there, can acquire citizenship of the Republic of Slovenia, on condition that such a person files an application with the administrative organ competent for internal affairs of the community where he resides ..." ("Nationalité, minorités et succession d'États dans les pays d'Europe centrale et orientale", documents 1, op.cit.); article 30, paragraph 2, of the Law on Croat Nationality of 26 June 1991 provided that any person belonging to the Croat people who did not hold Croat nationality on the day of the entry into force of the Law but who could prove that he had been legally resident in the Republic of Croatia for at least

acquire the nationality of their State of residence nearly all took advantage of such offer. 9/ Where such possibility was considerably limited, serious difficulties arose in practice. 10/

(6) Having examined State practice, including most recent developments, the Commission reaffirmed the importance of the criterion of habitual residence and decided to resort to "citizenship" of a constituent unit of a State only with respect to persons residing outside the territory of a particular successor State. In the same vein, article 8, paragraph (a), of the recently adopted Venice Declaration, confirmed the rule that "[i]n all cases of State succession, the successor State shall grant its nationality to all nationals of the predecessor State residing permanently on [its] territory." 11/

(7) Paragraph (b) sets out rules for the attribution of the nationality of a successor State to persons concerned having their habitual residence outside its territory. Subparagraph (i) deals with persons concerned who have their habitual residence either in a third State or in another successor State. The criterion used is "an appropriate legal connection with a constituent unit of the predecessor State" that has become part of a particular successor State. It goes without saying that this criterion can only be used where a bond of a legal nature between constituent units of the predecessor State and persons concerned existed under the internal law of that

---

10 years, would be considered to be a Croat citizen if he supplied a written declaration in which he declared that he regarded himself as a Croat citizen (ibid.); and article 29 of the Citizenship Act of Bosnia and Herzegovina, as amended in April 1993, provided that all citizens of the former Socialist Federal Republic of Yugoslavia resident on the territory of Bosnia and Herzegovina as of 6 April 1992 became automatically nationals of Bosnia and Herzegovina (see Batchelor, Leclerc, Schack, op. cit., p. 27).

9/ For instance, the practice of the Czech Republic indicates that nearly all persons concerned habitually resident in its territory who did not acquire Czech nationality ex lege on the basis of the criterion of "citizenship" of the constituent unit of the Federation acquired such nationality via optional application. Thus, some 376,000 Slovak nationals acquired Czech nationality in the period from 1 January 1993 to 30 June 1994, mostly by option under article 18 of the Czech Law on Acquisition and Loss of Citizenship. The outcome was not substantially different from what would have resulted from the use of the criterion of habitual residence. See Report of the Experts of the Council of Europe on the Citizenship Laws, op. cit., para. 22 and note 7.

10/ Batchelor, Leclerc, Schack, op. cit., pp. 4 et seq.

11/ Council of Europe document CDL-NAT (96) 7 rev.

State. As discussed above, this was mostly the case of certain federal States. 12/

(8) Where subparagraph (i) is applicable, the majority of persons concerned having their habitual residence outside the territory of a particular successor State will fall under this category and subparagraph (ii) will come into play rather exceptionally, i.e. with respect to persons not already covered by subparagraph (i). Otherwise, the criteria in subparagraph (ii) are the main criteria for the attribution of nationality to persons concerned who, on the date of the succession of States, had their habitual residence outside the territory of the predecessor State. Thus, contrary to subparagraph (i), subparagraph (ii) only deals with persons concerned who have their habitual residence in a third State.

(9) The criteria referred to in subparagraph (ii) are those which were most often used in State practice, namely place of birth and place of the last habitual residence in the territory of the predecessor State. The Commission, however, did not want to exclude the use of other criteria, as indicated by the phrase "or having any other appropriate connection with that successor State." It emphasized, at the same time, that the use of any such criteria must be consistent with the general obligation of non-discrimination under article 14. Some members expressed reservations with regard to the terms "appropriate connection" which they considered too vague and proposed that they be replaced with the expression "effective link".

(10) Article 22 does not address the question of the mode of attribution by the successor State of its nationality. A successor State may

---

12/ See footnote 6 above.

fulfil its obligation under this provision either by means of automatic attribution of its nationality to persons concerned or by providing for the right of these persons to acquire such nationality upon option.

(11) The application of the criteria in article 22 may result in a person concerned being qualified to acquire the nationality of more than one successor State. In such case, the attribution of nationality will depend on the option of such person, as indicated by the phrase "subject to the provisions of article 23". Moreover, paragraph (b) is subject to the provision in article 7 whereby a State is prohibited from attributing its nationality to persons concerned having their habitual residence outside its territory against their will. Accordingly, the obligation of a State under paragraph (b) is to be implemented either through an "opting-in" procedure or by ex lege attribution of its nationality with an option to decline ("opting-out" procedure).

(12) Paragraph 1 of article 23 provides for the right of option of persons concerned who are qualified to acquire the nationality of two, or, in certain cases, even more than two, successor States. Such "double qualification" may occur, for instance, when a person concerned habitually resident in one successor State had, prior to the dissolution, the "citizenship" of a constituent unit of the predecessor State which became part of another successor State. There are several recent examples of State practice in which a right of option was granted in such circumstances. 13/ This may also occur when a person concerned habitually resident in a third State was born in the territory which became part of one successor State but

---

13/ Article 3, paragraph 1, of the Law on Citizenship of the Slovak Republic provided that every individual who was on 31 December 1992 a citizen of the Czech and Slovak Federal Republic and did not acquire the citizenship of Slovakia ipso facto, had the right to opt for the citizenship of Slovakia. It was mainly addressed to those persons who, by virtue of the Czech Law, became ex lege Czech nationals but were habitual residents of Slovakia. (See the materials submitted by Slovakia.) Similarly, article 18 of the Czech Law on Acquisition and Loss of Citizenship set out the conditions for the optional acquisition of Czech nationality by persons habitually resident in the Czech Republic who acquired ex lege the Slovak nationality. (See the materials submitted by the Czech Republic). Another example is the Yugoslav Citizenship Law (No. 33/96). In addition to basic provisions concerning the ex lege acquisition of nationality, article 47 stipulated that "Yugoslav citizenship may be acquired by any citizen of the Socialist Federal Republic of Yugoslavia who was a citizen of another ... republic [of the Federation] ... whose residence was in the territory of Yugoslavia on the date of the proclamation of the Constitution." (See the materials submitted by Yugoslavia).

also has an appropriate connection, such as family ties, with another successor State.

(13) Paragraph 2 deals with persons concerned who have their habitual residence in a third State and who are not covered by the provisions of article 22, paragraph (b), such as those who acquired the nationality of the predecessor State by filiation or naturalization and were never residents thereof. Unless they have the nationality of a third State, these persons would become stateless. The purpose of the option envisaged under paragraph 2, however, is not limited to the avoidance of statelessness, but is to enable such persons to acquire the nationality of at least one successor State, thus giving effect to the right to a nationality as embodied in article 1.

## SECTION 4

## SEPARATION OF PART OR PARTS OF THE TERRITORY

### Article 24 1/

### Attribution of the nationality of the successor State

When part or parts of the territory of a State separate from that State and form one or more successor States while the predecessor State continues to exist, a successor State shall, subject to the provisions of article 26, attribute its nationality to:

(a) persons concerned having their habitual residence in its territory; and

(b) without prejudice to the provisions of article 7:

(i) persons concerned not covered by subparagraph (a) having an appropriate legal connection with a constituent unit of the predecessor State that has become part of that successor State;

(ii) persons concerned having their habitual residence in a third State, who were born in or, before leaving the predecessor State, had their last habitual residence in what has become the territory of that successor State or having any other appropriate connection with that successor State.

### Article 25 2/

### Withdrawal of the nationality of the predecessor State

1. Subject to the provisions of article 26, the predecessor State shall withdraw its nationality from persons concerned qualified to acquire the nationality of the successor State in accordance with article 24. It shall not, however, withdraw its nationality before such persons acquire the nationality of the successor State.

2. Subject to the provisions of article 26, the predecessor State shall not, however, withdraw its nationality from persons referred to in paragraph 1 who

(a) have their habitual residence in its territory;

---

1/ Article 24 corresponds to articles 22 and 23 proposed by the Special Rapporteur in his Third report, document A/CN.4/480/Add.1, p. 36.

2/ Article 25 corresponds to article 24 proposed by the Special Rapporteur in his Third report, ibid., p. 44.

(b) are not covered by subparagraph (a) and have an appropriate legal connection with a constituent unit of the predecessor State that has remained part of the predecessor State;

(c) have their habitual residence in a third State, and were born in or, before leaving the predecessor State, had their last habitual residence in what has remained part of the territory of the predecessor State or have any other appropriate connection with that State.

Article 26 3/

Granting of the right of option by the predecessor and the successor States

Predecessor and successor States shall grant a right of option to all persons concerned covered by the provisions of articles 24 and 25 who are qualified to have the nationality of both the predecessor and successor States or of two or more successor States.

Commentary

(1) Section 4 consists of three articles, i.e. articles 24, 25 and 26, and applies to the case of separation of part or parts of the territory. The distinction between this situation and the case of the dissolution of a State has been explained in the commentary to section 3 above. As stressed by the Commission in its commentaries to draft articles 14 and 17 on succession of States in respect of matters other than treaties, 4/ the case of separation of part or parts of the territory of a State must also be distinguished from the case of the emergence of newly independent States, the territory of which, prior to the date of the succession, had a "status separate and distinct from the territory of the State administering it". 5/

(2) The substantive rules in articles 24 to 26, however, may be applied mutatis mutandis in any possible future case of emergence of a newly independent State.

---

3/ Article 26 corresponds to article 25 proposed by the Special Rapporteur in his Third report, ibid., p. 50.

4/ Yearbook ... 1981, vol. II (Part Two), pp. 37 and 45, document A/36/10, para. (2) of the commentary to draft article 14 and para. (5) of the commentary to draft article 17.

5/ See the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, General Assembly resolution 2625 (XXV) of 24 October 1970, annex.

(3) Given the fact that it is sometimes difficult in practice to distinguish between dissolution and separation, the Commission considered it important that the rules applicable in those two situations be equivalent. Accordingly, article 24 on the attribution of the nationality of the successor State is drafted along the lines of article 22.

(4) Paragraph (a) of article 24 sets out the basic rule that the successor State shall attribute its nationality to persons concerned habitually resident in its territory. It must be recalled that an analogous provision regarding the case of separation was included in paragraph (b) of article 18 of the 1929 Harvard Draft Convention on Nationality. 6/

(5) This rule was applied in practice after the First World War in the case of the establishment of the Free City of Danzig 7/and the dismemberment of the Austro-Hungarian Monarchy. 8/ More recently, it was applied in the case of the separation of Bangladesh from Pakistan in 1971, 9/and also when

---

6/ This provision stipulated that, "[w]hen a part of the territory of a State ... becomes the territory of a new State, the nationals of the first State who continue their habitual residence in such territory lose the nationality of that State and become nationals of the successor State, in the absence of treaty provisions to the contrary, unless in accordance with the law of the successor State they decline the nationality thereof". (American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 15).

7/ See article 105 of the Peace Treaty of Versailles, Materials on succession of States, op. cit., p. 489.

8/ See article 70 of the Peace Treaty of Saint-Germain-en-Laye, ibid., p. 496. The rule applied equally to States born from separation and those born from dissolution. It was also embodied in respective article 3 of the Treaty of Versailles with Poland, the Treaty of Saint-Germain-en-Laye with Czechoslovakia, the Treaty of Saint-Germain-en-Laye with the Serb-Croat-Slovene State and the Treaty of Paris with Romania. (G.F. de Martens, Nouveau recueil général de traités, third series, vol. XIII, pp. 505, 514, 524 and 531 respectively.)

9/ Residence in its territory was considered to be the primary criterion for the attribution of the nationality of Bangladesh, regardless of any other considerations. However, non-Bengalese inhabitants of the territory were required to make a simple declaration in order to be recognized as nationals of Bangladesn; they could also opt for the retention of Pakistani nationality. (See M. Rafiqul Islam, "The Nationality Law and Practice of Bangladesh", in Ko Swan Sik (ed.), Nationality and International Law in Asian Perspective (Dordrecht, Martinus Nijhoff, 1990), pp. 5-8.)

Ukraine 10/and Belarus 11/became independent following the disintegration of the Soviet Union. It may also be noted that the criterion of habitual residence was used in practice by some newly independent States. 12/

(6) A different criterion was used in the case of the separation of Singapore from the Federation of Malaysia in 1965, namely that of the "citizenship" of Singapore as a component unit of the Federation, which existed in parallel to the nationality of the Federation. 13/ Yet another criterion, the place of birth, was applied in the case of the separation of Eritrea from Ethiopia in 1993, 14/probably inspired by the earlier practice of a number of newly independent States. 15/

(7) As it did in article 22 with respect to the case of dissolution, the Commission decided to resort to the criterion of habitual residence for the determination of the core body of the population of a successor State. In so doing, it took into consideration both the prevailing practice as well as the drawbacks of the use of other criteria to this end, such as rendering a considerable population alien in its homeland. 16/

---

10/ Article 2 of the Law on Citizenship of Ukraine No. 1635 XII of 8 October 1991 (see the materials submitted by Ukraine).

11/ Article 2 of the Law on Citizenship of the Republic of Belarus of 18 October 1991, as amended by the Law of 15 June 1993 and the Proclamation of the Supreme Soviet of the Republic of Belarus of 15 June 1993 (see the materials submitted by Belarus).

12/ See Onuma, op. cit., p. 15.

13/ Goh Phai Cheng, op. cit., p. 9. Comparable criteria were also used by some newly independent States in order to define the core body of their nationals during the process of decolonization. See de Burlet (1975), op. cit., p. 120, who makes reference to "nationalités spéciales" ... créées en vue d'une indépendance future [qui] n'étaient destinées à s'épanouir pleinement qu'avec cette indépendance". See also pp. 124 and 129. See further the example of the Philippines cited in Onuma, op, cit., note 96.

14/ See Eritrean Nationality Proclamation No. 21/1992 of 6 April 1992 (Text in Eritrea - Referendum of Independence, April 23-25, 1993 (African-American Institute), pp. 80-84).

15/ For examples of such practice, see Onuma, op. cit., pp. 13-14, and the Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (15) to (18) of the commentary to draft article 23 proposed by the Special Rapporteur.

16/ See Onuma, op. cit., p. 29.

(8) As regards paragraph (b), it was included in article 24 for reasons similar to those leading to the inclusion of paragraph (b) in article 22. 17/ The commentary to the latter provision is therefore also relevant to paragraph (b) of article 24.

(9) Paragraph 1 of article 25 deals with the withdrawal of the nationality of the predecessor State as a corollary to the acquisition of the nationality of the successor State. This provision is based on State practice which, despite some inconsistencies, indicates that such withdrawal has been to a large extent an automatic consequence of the acquisition by persons concerned of the nationality of a successor State. 18/ The withdrawal of the nationality of the predecessor State is subject to two conditions. First, that persons qualified to acquire the nationality of the successor State did not opt for the retention of the nationality of the predecessor State under the terms of article 26. This is the meaning of the opening phrase "Subject to the provisions of article 26". Second, that such withdrawal shall not occur prior to the effective acquisition of the successor State's nationality. The purpose of this condition is to avoid statelessness, even if only temporary, which could result from a premature withdrawal of nationality. 19/

---

17/ See paras. (7) to (9) of the commentary to section 3 above. For the practice relating to the use of the criterion referred to in subparagraph (b) (i) of article 24, see footnote 13 above. For the use of the criterion of the place of birth listed in subparagraph (ii), see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (5) and (6) of the commentary to draft article 23 proposed by the Special Rapporteur. See also article 2, paragraph (2), of the Law on Citizenship of Ukraine, stipulating that the citizens of Ukraine include "persons who are ... permanent residents in another country provided they were born in Ukraine or have proved that before leaving for abroad, they had permanently resided in Ukraine, who are not citizens of other States and not later than five years after enactment of this Law express their desire to become citizens of Ukraine" (see the materials submitted by Ukraine).

18/ For examples from State practice, see Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (8) of the commentary to draft article 24 proposed by the Special Rapporteur. As regards the doctrine, see footnote 6 above.

19/ See also article 12 of the Venice Declaration which prohibits the predecessor State from withdrawing its nationality from its own nationals who have been unable to acquire the nationality of a successor State. Council of Europe document, CDL-NAT (96) 7 rev.

(10) Paragraph 2 of article 25 lists the categories of persons concerned who are qualified to acquire the nationality of the successor State but from whom the predecessor State shall not withdraw its nationality, unless they opt for the nationality of the successor State - a condition which is reflected in the opening phrase "Subject to the provisions of article 26". The criteria used for the determination of these categories of persons are the same as those in article 24.

(11) Some members believed that this paragraph was superfluous, while others considered it necessary for the purpose of defining the categories of persons to whom a right of option between the nationality of the predecessor and the successor States should be granted.

(12) Article 26 deals with the right of option. There are numerous cases in State practice where a right of option was granted in case of separation of part or parts of the territory. 20/

(13) Article 26 covers both the option between the nationalities of the predecessor State and a successor State as well as the option between the nationalities of two or more successor States. Contrary to what is provided in article 20 with respect to a transfer of territory, in the case of separation of part or parts of the territory, the right of option for the retention of the nationality of the predecessor State is not envisaged for all persons concerned qualified to acquire the nationality of the successor State. This right is limited to those persons who, at the same time, fulfil one of the criteria in article 24 and one of those in article 25, paragraph 2. This would be, for instance, the case of a person concerned habitually resident in a third State who was born in the territory of what became a successor State but before leaving for abroad had his or her last habitual residence in the territory that has remained part of the predecessor State.

(14) Similarly, the right of option between the nationalities of two or more successor States has to be granted only to persons concerned who, by virtue of the criteria in article 24, are qualified to acquire the nationality of more than one successor State. Leaving aside the case where the criterion

---

20/ See Third report on nationality in relation to the succession of States, document A/CN.4/480/Add.1, paras. (1) to (5) of the commentary to draft article 25 proposed by the Special Rapporteur.

referred to in subparagraph (b) (i) would be applicable, the right of option is only envisaged for some persons concerned habitually resident in a third State.

(15) Some members were of the view that the provisions of section 1 concerning a transfer of territory and section 4 on separation should be drafted along the same lines, as they saw no reason to apply different rules in these two situations.

Article 27

Cases of succession of States covered by the present draft articles

Without prejudice to the right to a nationality of persons concerned, the present draft articles apply to the effects of a succession of States occurring in conformity with international law and, in particular, with the principles of international law embodied in the Charter of the United Nations.

Commentary

(1) As it already stated in the commentary to article 6 of the draft articles on succession of States in respect of treaties, "[t]he Commission in preparing draft articles for the codification of the rules of international law relating to normal situations naturally assumes that those articles are to apply to facts occurring and situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law". 1/ Nevertheless, the two Vienna Conventions on the Succession of States contain a provision limiting explicitly their scope of application to successions of States occurring in conformity with international law. 2/

(2) For purposes of consistency with the approach adopted in the above two Conventions, the Commission decided to include in the present draft articles the provision in article 27 which is based on the relevant provisions of these instruments, although it is evident that the present draft articles address the question of the nationality of natural persons in relation to a succession of States which took place in conformity with international law.

---

1/ Yearbook ... 1974, vol. II (Part One), p. 181, document A/9610/Rev.1, para. (1) of the commentary to draft article 6.

2/ See article 6 of the Vienna Convention on Succession of States in respect of Treaties and article 3 of the Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

The Commission did not consider questions relating to the present topic which could arise in situations such as military occupation 3/ or illegal annexation of territory.

(3) The present draft articles embody certain rights of individuals whose scope of application is broader than the present topic. The Commission therefore felt it desirable to reflect this fact in the opening phrase of article 27. Some members, however, expressed reservations with respect to this phrase, as they believed that it rendered the entire provision ambiguous.

(4) As this provision was included in the draft articles at a late stage of the Commission's work on the topic, the Commission left the decision on its final placement for the second reading.

---

3/ It is worth noting that article 40 of the Vienna Convention on the Succession of States in respect of Treaties stipulates that "[t]he provisions of the present Convention shall not prejudge any questions that may arise in regard to a treaty from the military occupation of a territory".

UNITED
NATIONS

A

General Assembly

Distr.
LIMITED

A/CN.4/L.539/Add.7
10 July 1997

Original: ENGLISH

INTERNATIONAL LAW COMMISSION
Forty-ninth session
12 May - 18 July 1997

# DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-NINTH SESSION

Rapporteur: Mr. Zdzislaw Galicki

## CHAPTER II

## NATIONALITY IN RELATION TO SUCCESSION OF STATES

Addendum

CONTENTS

| | | Paragraphs | Page |
|---|---|---|---|
| C. | Text of the draft articles on Nationality of natural persons in relation to the succession of States provisionally adopted by the Commission on first reading . . . . . | | |
| 1. | Text of the draft articles (see A/CN.4/L.539/Add.1) . . . . . | | |
| 2. | Text of the draft articles with commentaries thereto . . . . . | | |
| PREAMBLE . . . . . | | | |

## Draft articles on Nationality of natural persons in relation to the succession of States

### PREAMBLE

The General Assembly,

Considering that problems of nationality arising from succession of States are of concern to the international community,

Emphasizing that nationality is essentially governed by internal law within the limits set by international law,

Recognizing that in matters concerning nationality, due account should be taken both of the legitimate interests of States and those of individuals,

Recalling that the Universal Declaration of Human Rights of 1948 proclaimed the right of every person to a nationality,

Recalling also that the International Covenant on Civil and Political Rights of 1966 and the Convention on the Rights of the Child of 1989 recognize the right of every child to acquire a nationality,

Emphasizing that the human rights and fundamental freedoms of persons whose nationality may be affected by a succession of States must be fully respected,

Bearing in mind the provisions of the Convention on the Reduction of Statelessness of 1961, the Vienna Convention on Succession of States in Respect of Treaties of 1978 and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts of 1983,

Convinced of the need for the codification and progressive development of the rules of international law concerning nationality in relation to the succession of States as a means for ensuring greater juridical security for States and for individuals,

Declares the following:

#### Commentary

(1) The title "Draft articles on Nationality of natural persons in relation to the succession of States" is in conformity with the mandate which the General Assembly entrusted to the Commission under the terms of resolution 51/160, in which the Assembly invited the Commission to undertake a substantive study of the topic entitled "Nationality in relation to the succession of States" and to give priority to the consideration of the question of the nationality of natural persons.

(2) In the past, the Commission generally presented to the General Assembly sets of draft articles without a draft preamble, leaving its elaboration to States. In this instance, however, the Commission decided to follow the precedent of the two Draft Conventions on the Elimination of Future Statelessness, and on the Reduction of Future Statelessness, which were both submitted with a preamble.

(3) The first preambular paragraph indicates the raison d'être of the present draft articles: the concern of the international community as to the resolution of nationality problems in the case of a succession of States. Such concerns have re-emerged in connection with recent cases of succession of States. A number of international bodies have been dealing with this question.

(4) The second preambular paragraph expresses the point that, although nationality is essentially governed by national legislation, it is of direct concern to the international legal order. The existence of limits to the competence of States in this field has been established by various authorities. In its advisory opinion in the case concerning

---

[1] See Yearbook ... 1954, vol. II, p. 143. The Draft Declaration on Rights and Duties of States also included a draft preamble. See Yearbook ... 1949, p. 287.

Thus, the Council of Europe adopted on 14 May 1997 a European Convention on Nationality containing, inter alia, provisions regarding the loss and acquisition of nationality in situations of State succession, Council of Europe document DIR/JUR (97) 6. Another organ of the Council of Europe, the European Commission for Democracy through Law (Venice Commission), adopted in September 1996 a Declaration on the Consequences of State Succession for the Nationality of Natural Persons (hereinafter "Venice Declaration"), Council of Europe document CDL-NAT (96) 7 rev. As for the problem of statelessness, including statelessness resulting from a succession of States, it appears to be of growing interest to the Office of the United Nations High Commissioner for Refugees (UNHCR). For a review of the recent activities of UNHCR in this field, see Carol A. Batchelor, "UNHCR and Issues Related to Nationality", Refugee Survey Quarterly, vol. 14, No. 3, pp. 91-112. See also the report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the work of its forty-sixth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 12A (A/50/12/Add.1, para. 20), and the report of the Subcommittee of the Whole on International Protection (A/AC.96/858, paras. 21-27), as well as General Assembly resolution 51/175 of 12 December 1996, entitled "Office of the United Nations High Commissioner for Refugees".

Nationality Decrees Issued in Tunis and Morocco[1], the Permanent Court of International Justice emphasized that the question whether a matter was solely within the jurisdiction of a State was essentially a relative question, depending upon the development of international relations, and it held that even in respect of matters which in principle were not regulated by international law, the right of a State to use its discretion might be restricted by obligations which it might have undertaken towards other States, so that its jurisdiction became limited by rules of international law.[2] Similarly, article 2 of the 1929 Harvard Draft Convention on Nationality asserts that the power of a State to confer its nationality is not unlimited.[3] Article 1 of The Hague Convention of 1930 on Certain Questions relating to the Conflict of Nationality Laws provides that, while it is for each State to determine under its own law who are its nationals, such law shall be recognized by other States only "insofar as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality".[4] Moreover, the Commission considered that, in the specific context of a succession of States, international law has an even larger role to play, as such situation may involve a change of nationality on a large scale.

(5) Further international obligations of States in matters of nationality emerged with the development of human rights law after the Second World War, although the need for the respect of the rights of individuals had also been pointed out in connection with the preparations for the 1930 Hague Conference.[5] As it was stated more recently by the Inter-American Court of

---

[1] P.C.I.J., 1923, Series B, No. 4, p. 24.

[2] See also Sir Robert Jennings and Sir Arthur Watts, eds., Oppenheim's International Law, 9th ed., vol. I (London, Longman, 1992), p. 852.

[3] American Journal of International Law, vol. 23 (Special Suppl.) (1929), p. 13.

[4] See Laws concerning nationality, United Nations Legislative Series, ST/LEG/SER.B/4, p. 567.

[5] "The scope of municipal laws governing nationality must be regarded as limited by consideration of the rights and obligations of individuals and of other States." League of Nations Conference for the Codification of International Law, Bases for Discussion, vol. I (Nationality), C.73.M.38. 1929.V, Reply of the United States of America, p. 16.

Human Rights, "the manner in which States regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; (the powers enjoyed by the States in that area) are also circumscribed by their obligations to ensure the full protection of human rights".

(6) As a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided. Accordingly, the Commission found it appropriate to affirm in the third preambular paragraph that, in matters concerning nationality, the legitimate interests of both States and individuals should be taken into account.

(7) The fourth, fifth and seventh preambular paragraphs recall international instruments which are of direct relevance to the present draft articles. The instruments referred to in the seventh preambular paragraph are the product of the earlier work of the Commission in the two fields of nationality and of succession of States.

(8) The sixth preambular paragraph expresses the fundamental concern of the Commission in the protection of the human rights of persons whose nationality may be affected following a succession of States. State practice has focused on the obligation of the new States born from the territorial changes to protect the basic rights of all inhabitants of their territory without distinction. The Commission, however, concluded, that, as a matter of principle, it was important to safeguard basic rights and fundamental freedoms of all persons whose nationality may be affected by a succession, irrespective of the place of their habitual residence.

(9) The eighth preambular paragraph underlines the need for the codification and progressive development of international law in the area under consideration, i.e. nationality of natural persons in relation to the

---

[6] Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (1984), ILR, vol. 79, para. 32.

[7] See also the first preambular paragraph of the Venice Declaration, Council of Europe document CDL-NAT (96) 7 rev. and the fourth preambular paragraph of the European Convention on Nationality, Council of Europe document DIR/JUR (97) 6.

[8] See Third report on nationality in relation to the succession of States, document A/CN.4/480, paras. (1) to (3), and (5) of the commentary to draft article 11 proposed by the Special Rapporteur.

succession of States. It is interesting to note that, as early as 1956, D.P. O'Connell, while recognizing that "[t]he effect of change of sovereignty upon the nationality of the inhabitants of the [territory affected by the succession] is one of the most difficult problems in the law of State succession", stressed that "[u]pon this subject, perhaps more than any other in the law of State succession, codification or international legislation is urgently demanded". [11] The wording of this preambular paragraph is essentially based on the equivalent paragraphs of the preambles to the Vienna Conventions on Succession of States of 1978 and 1983.

---

[11] D.P. O'Connell, The Law of State Succession (Cambridge, United Kingdom, Cambridge University Press, 1956), pp. 245 and 258.